

2016

Asbestos related deaths

Clydeside Action on Asbestos

It is the duty of the Procurator Fiscal to investigate sudden, suspicious, accidental, unexpected and unexplained deaths when made aware of them. Specific categories of deaths must be further investigated by the Procurator Fiscal. These categories of deaths include those arising out of industrial diseases of the lungs, such as mesothelioma, asbestosis and asbestos-related lung cancer



Background

Clydeside Action on Asbestos (CAA) is Scotland's largest asbestos charity. Each year we deal with more than 750 individuals diagnosed with an asbestos related disease (ARD). More than 150 suffer from mesothelioma and another 50 are suffering from lung cancer.

CAA provides those individuals and their families with advice on their entitlement to benefits and government compensation. We also provide information on their legal entitlement to pursue a claim for civil compensation as the majority of cases of asbestos disease continue to be caused by the negligence of a current or former employer.

In addition to the medical implications that can arise from a diagnosis of mesothelioma or asbestos related lung cancer, there remain many other outstanding issues to resolve.



Many of those diagnosed with an ARD are unaware that a past employer could be to blame for negligently exposing them to asbestos. Most are also unaware that the Procurator Fiscals' duty to investigate deaths from 'industrial disease' may potentially involve contact with the Procurator Fiscal and the police.

Most of those who suffer from an ARD contract the disease from exposure to asbestos at work. This exposure may have occurred 40 years or more before their diagnosis. This often leads those who suffer from terminal conditions such as mesothelioma and lung cancer, and their families, to feel angry and distressed by this thought.

They wonder how this could have been allowed to happen when the dangers from asbestos have been known by the government and employers for many decades.

The issue of fault is uppermost in the minds of many, particularly those who suffer from a terminal disease caused by their employment. They feel aggrieved. Sufferers and their families blame employers, insurers and the government for any delays in payments of compensation, causing unnecessary distress.

Financial recompense is secondary to the belief that compensation should involve recognition of the negligence and harm that has been done by their former employer's failure to protect them from exposure to asbestos.

In order to reduce distress caused to families when a person diagnosed with mesothelioma or suspected of having mesothelioma dies. A Pro Forma was devised:

Its intent is to distil information required by the PF through a structured consistent record, enabling the PF to make decisions expeditiously without always requiring a post mortem to establish the facts required for a civil case for compensation to proceed.

The Pro Forma is intended to benefit bereaved relatives, but also the COPFS and the NHS. Its intent was to obviate the need for relatives to be interviewed by the police at what is a very stressful

*time and also to reduce the medical staff and the police interview time.*¹

The Procurator Fiscal has indicated where there has been a positive biopsy in life, diagnosing the industrial disease; it may be possible for the cause of death to be certified without the need for a Post Mortem, depending on what evidence of industrial disease was obtained during life.

In CAA's experience, the Pro Forma does not yet appear to have been universally implemented and there are still instances where family members have received a call from the Procurator Fiscal or been visited by the Police where histological evidence of diagnosis has been available.

There remain some instances where histological evidence (positive biopsy confirmed evidence) will not be available. This could be due to factors such as the rapid nature of the death or where the individual has been too unwell to undergo a biopsy procedure in life. Confirmation of mesothelioma will more commonly involve a lung biopsy. However, mesothelioma can occur in the peritoneum and pericardium.

Specialist solicitors in this field of personal injury advise that, in order for the deceased's widow/widower and/or family members to progress any potential claim, the cause of death must be established and to that end a post mortem is advisable. If however there is a robust histological diagnosis (biopsy) of mesothelioma in life then a post mortem may be avoided but that decision is for the Procurator Fiscal.

Some family members can become extremely distressed at the prospect of a post mortem taking place or being advised that their loved ones funeral may be delayed. It's not uncommon to hear a bereaved family member

say: "I think they have suffered enough why does there have to be a post mortem"

CAA ensure, where possible, that families, particularly, those who have a family member with mesothelioma, are aware of the possible implications after death. It is of course for those family members to decide whether they wish to pursue a claim for compensation.

We have to bear in mind that this is a very stark experience and an extremely difficult time for those families. Many family members speak of being traumatised by the experience. CAA are obligated to advise those family members that without definitive evidence of mesothelioma, from either an in life biopsy or post mortem, it may be extremely difficult for the family to receive any civil compensation for the death of their loved one.

For family members who find themselves in that very difficult position we know financial recompense is not their priority and often it is the last thing they want to contemplate. However, families who come through this process invariably intimate to us that the pursuit of a claim for compensation is, for them, about recognition: Recognition that someone is responsible for the death of their loved one.

The successful conclusion of a claim for compensation means the death of their loved one matters and meant something. To this end the legal process can allow bereaved families to feel a sense of closure.

What is Asbestos?

The term asbestos refers to certain minerals with a fibrous structure called silicates which are found in the soil in certain parts of the world. Asbestos is a very good insulator against heat, sound and electricity and so it was mined to make very useful building materials.

¹ Chief Medical Officer Sir Harry Burns MPH FRCS(Glas) FRCP(Ed) FFPH Crown Agent and Chief Executive Catherine Dyer (17 March 2014)

Unfortunately, breathing in asbestos fibres causes life threatening diseases.

The UK Government currently only accepts the following 'prescribed diseases' as asbestos related for the purposes of claiming Industrial Injuries Disablement Benefit (IIDB) and government compensation. Each disease has an allocated Prescribed Disease (PD) or (D) number i.e. D1, D3, D8, and D8A & D9.

- D1 – Asbestosis
- D3 – Mesothelioma (tumour most usually presents in the lung but can be of peritoneum or pericardium)
- D8 – Primary carcinoma of the lung where there is accompanying evidence of asbestosis
- D8A – Primary carcinoma of the lung
- D9 – Diffuse Pleural Thickening

Incidence

Scotland has one of the highest incidences of mesothelioma and asbestos-related lung cancer in the world.

Male deaths are concentrated around ports and dockyards. Asbestos was used as insulation in ships and workers were exposed to it during fitting out and shipbreaking activities.

The area with the highest mortality rate is the shipbuilding area of Clydebank, which had a much higher rate than the average for Great Britain. Other port and dockyard areas within Strathclyde (Dumbarton, Bearsden and Milngavie, Glasgow city, Renfrew and Inverclyde) and Dunfermline also had high mortality rates.

The overall mortality rate for Scotland is higher than the UK national average mainly due to these shipbuilding areas.²

Asbestos is still in place in many buildings in Scotland. This includes factories, offices, hospitals and schools (75% of schools built post war contain asbestos). This results in continuing occupational exposure for construction, maintenance and demolition workers if adequate precautions are not taken to identify and deal with asbestos.



People using the building may be at risk if the asbestos is poorly maintained.

There are an estimated 500 deaths per year in Scotland from asbestos related diseases mesothelioma and lung cancer.

- From 1990 – 2014 more than 4,500 Scots were diagnosed with mesothelioma. 632 were female.
- From 2003-2013, 4,015 Scots were awarded government benefits and compensation for an asbestos-related prescribed industrial disease. 1,670 were suffering from mesothelioma (150 of whom were female)

² Mesothelioma in Great Britain 2014 - Mesothelioma mortality in Great Britain 1968-2013
<http://www.hse.gov.uk/statistics/causdis/mesothelioma/mesothelioma.pdf>

- The incidence of mesothelioma in Scotland has a wide geographical spread.

Ayrshire and Arran - 73
Borders - 21
Dumfries and Galloway - 23
Fife - 89
Forth Valley - 58
Grampian - 80
Greater Glasgow and Clyde - 298
Highland and Argyll - 71
Lanarkshire - 112
Lothian - 124
Orkney - 3
Shetland - 0
Tayside - 59
Western Isles - 5

Incidence of mesothelioma 2010 – 2014 by Health Board Area
ISD Scotland³

The overall scale of asbestos-related lung cancer deaths has to be estimated rather than counted. This is because asbestos is one of a number of factors, including smoking, which can cause lung cancer. Individual cases usually have no specific clinical signs suggesting a particular cause, and factors such as asbestos exposure and smoking often act together to increase the risk.⁴

Research suggests there are probably about as many asbestos-related lung cancer deaths each year as there are mesothelioma deaths.

Entitlement to compensation

An individual diagnosed with an asbestos related disease as a result of occupational exposure to asbestos may be entitled to

industrial injuries benefit and compensation from the UK government.

Those diagnosed with mesothelioma are entitled to a lump sum payment from the UK government regardless of how they contracted the disease.

There is a strict time limit of 12 months from death for dependants of the deceased to claim posthumously for UK government benefits/compensation.

Those who contract asbestos related diseases from exposure due to their past employment may be entitled to pursue a claim for compensation against those employers.

Any employer who can be shown to have materially contributed to an individual developing an asbestos related condition and who acted negligently may be liable to pay that individual and/or their family members, compensation. Even if the employer has ceased trading, action can still be taken if an employer's liability insurers can be traced.

In order for those individuals/family members to pursue this type of claim, it will be necessary for them to retain the services of a specialist solicitor. This type of civil/personal injury claim is highly specialised and not always straightforward. There can be many obstacles to overcome before an individual or their family receive compensation, if at all.

It is not always clear for example that an individual's medical condition is caused by asbestos exposure. This is particularly relevant in dealing with asbestos related cancer and mesothelioma.

It is open to defendants in any civil case, to challenge that an individual was exposed in a particular employment with a particular

³ <http://www.isdscotland.org/Health-Topics/Cancer/Cancer-Statistics/Lung-Cancer-and-Mesothelioma/#mesothelioma> stats for Scotland

⁴ <http://www.hse.gov.uk/statistics/causdis/asbestos.htm>

employer. A detailed occupational history for each individual is therefore essential.

It is also open to defendant solicitors to challenge medical evidence. They will require proof that an individual was suffering from and/or died from an asbestos related disease

The fact that a death certificate features lung cancer or mesothelioma or some associated disease will not be sufficient evidence in itself to prove a civil claim for compensation.

Procurator Fiscal

It is the duty of the Procurator Fiscal to investigate sudden, suspicious, accidental, unexpected and unexplained deaths when made aware of them. Specific categories of deaths must be further investigated by the Procurator Fiscal.⁵

These categories of deaths include those arising out of industrial diseases of the lungs, such as mesothelioma, asbestosis and asbestos-related lung cancer.

The principal reason why such deaths are investigated is to ensure that there is no continuing danger to people who might be exposed to the same source of disease as the deceased.

Most deaths will relate to historical exposure, where the source of the disease no longer exists as a hazard.

However, some industrial disease may have resulted from a source that still exists and it is important that investigations are made into that

in order to establish whether consideration needs to be given to a prosecution, usually under health and safety legislation.

If the deceased was knowingly exposed to danger without adequate precautions being taken, consideration would be given by the Procurator Fiscal as to whether a two doctor post mortem is necessary to establish the cause of death. Cases involving potential prosecution under health and safety legislation are rare however.

One of the other important reasons why the Procurator Fiscal investigates deaths relating to historical exposure is to ensure preservation of evidence which may at some stage be needed for a civil claim for reparation.



This will often require a Post Mortem examination to be instructed by the Procurator Fiscal and carried out to allow samples to be taken which could confirm that an industrial disease is the cause of death.

Where industrial disease is suspected by a doctor as being the cause of death, the doctor has an obligation to report the death to the Procurator Fiscal.

There is no need to report deaths to the Procurator Fiscal in cases where the person may have had a diagnosis of pleural plaques,

⁵ Reporting deaths to the Procurator Fiscal
Scottish Fatalities Investigation Unit (SFIU West), Procurator Fiscal Office,
10 Ballater Street, Glasgow.
Reporting Deaths to the Procurator Fiscal-Guidance for Medical
Practitioners Publication (accessible through
<http://www.copfs.gov.uk/images/Documents/Deaths/Reporting%20Deaths%20to%20the%20Procurator%20Fiscal%202015.pdf>

diffuse pleural thickening or asbestosis, but has died of an unrelated illness.

- Where there has been a positive biopsy in life, diagnosing the industrial disease, it may be possible for the cause of death to be certified without the need for a Post Mortem, depending on what evidence of industrial disease was obtained during life.
- Where mesothelioma has been identified radiologically but histology has not been obtained, a Post Mortem examination will be required in order to secure the evidence that would be needed for a claim.

For the purposes of any civil claim the courts only require to be satisfied as to the cause of death on a balance of probabilities.

From May 2015 Medical Reviewers from Healthcare Improvement Scotland have been reviewing Death Certificates in around 10% of deaths which have not been reported to the Procurator Fiscal.

Where a death certificate is issued features an industrial disease somewhere in the cause of death, and has not been reported to the Procurator Fiscal, the death may be reviewed by the Medical Reviewers.

If it is, the death certificate will be returned to the doctor on the basis that the death was reportable. The death will then have to be reported to the Procurator Fiscal, as it should have been in the first place.

This set of circumstances will invariably cause distress to the deceased's relatives and will lead to delay in the death being processed as the Procurator Fiscal will then have to investigate the death.

Where a Death Certificate is not reviewed by the Medical Reviewers, but there has been no biopsy in life, the fact that the death certificate features mesothelioma or some associated disease will not be sufficient evidence in itself to prove a civil claim for reparation, should the family wish to do so.

This means that the family may have lost an opportunity to successfully claim. In these circumstances the family may attempt to raise a legal action against the NHS for failing to report the matter to the Fiscal

Solicitors and a Claim for Compensation

The basic premise of a compensation claim in Scotland is that where a person has been harmed as a result of the negligence of another then they are entitled to restitution.

In order to establish negligence, there has to have been a duty of care owed by one party to the other, which most commonly is created through the employer/employee relationship.

It can also arise where the occupier of premises has a duty, or the manufacturer of a product, or indeed simply because of the proximity of the relationship between two parties.

Asbestos exposure and the resultant medical conditions it gives rise to generate significant levels of litigation in Scotland each year. Asbestos use was at its highest between the late 1950s and the early 1970s and given the long latency period between exposure and onset of disease, many of those exposed decades ago are only now suffering the consequences.

As people continue to be exposed to asbestos already in situ in buildings of that era, it is likely that asbestos related conditions will continue to be diagnosed for decades to come.

- Pleural Plaques
- Diffuse Pleural Thickening (DPT);
- Asbestosis
- Asbestos related lung cancer
- Mesothelioma

Regardless of the diagnosis, each 'Pursuer' has to be able to establish who exposed them to asbestos, how, and to what extent; that in so doing, the 'Defender' acted negligently; and finally, the extent of the harm that they have suffered, physically, psychologically, and financially.

There is no concept of a 'class action' in Scots law so each individual must establish his or her own claim.

Where someone dies of an asbestos related disease, there will be additional claims for close relatives. The cause of death must be established and to that end a post mortem is advisable.

- **If there is a robust histological diagnosis of mesothelioma in life then a post mortem may be avoided but that decision is for the Procurator Fiscal.**

Where another of the conditions may have made a contribution to the death then the Fiscal should be informed.

If someone has suffered from an asbestos related disease and dies of an unrelated cause, their claim can still be advanced by their Executor.

In all types of personal injury claim, the injured party has three years from the date on which they know, or ought to know, that they have been injured as a result of another's

negligence. If no court proceedings are raised within that time, the case is time-barred.⁶

Mesothelioma Pro Forma

In March 2014 the introduction of a New Mesothelioma Pro Forma was agreed between the Crown Office and Procurator Fiscal Service (COPFS) and the Chief Medical Officer

A Pro Forma was devised with the aim of reducing distress caused to relatives when a person diagnosed with mesothelioma or suspected of having mesothelioma dies. Its intent is to distil information required by the PF through a structured consistent record, enabling the PF to make decisions expeditiously without always requiring a post mortem to establish the facts required for a civil case for compensation to proceed.



The Pro Forma is intended to benefit bereaved relatives, but also the COPFS and the NHS. Its intent was to obviate the need for relatives to be interviewed by the police at what is a very stressful time and also to reduce the medical staff and the police interview time.

Part 1 - Patient Health Record of Information

⁶ Laura Blane, Solicitor Advocate, Thompsons Solicitors, Glasgow.
<http://www.thompsons-scotland.co.uk/>

This section should be completed by the patient/next of kin

To confirm they are “content”, a confirmatory form can be obtained by the patient/next of kin, from the patient’s solicitors (via the relevant Asbestos Support/Action Group if necessary), if compensation has not been received by the patient. Such a letter from the solicitor may be attached to this section.

Part 2 - Patient Health Record of Information

This section should be completed by the Consultant in charge of the case at the time of diagnosis or by a nominated healthcare professional such as another doctor or a Clinical Nurse Specialist, on behalf of the Consultant in charge.

Parts 1 and 2

These should be retained by the patient with copies in the hospital clinical records.

Copies should be sent to the patient’s GP, other relevant Hospital if required, and the Hospice if/when a Hospice referral is made.

GPs should record the diagnosis on the, Emergency Care Summary (ECS), electronic Palliative Care Summary (ePCS), and (Key Information Summary) KIS.

Patient/next of kin should be encouraged to send copies to their solicitor and the appropriate Asbestos Support/Action Group

Part 3 - Notification of Death to the Procurator Fiscal (PF)

This document should be completed by the doctor who verified death and by the doctor notifying the PF of the death. Doctors should have regard to MCCD guidance.

The PF may request additional clinical information from the notifying doctor as appropriate.

Parts 1, 2 and 3 should be sent, with solicitors’ form if appropriate, to the Procurator Fiscal (PF) after the death of the patient, either electronically or via police officers. Copies should be held in the deceased patient’s clinical records.

The body should be identified to the attending police officers in case a Post Mortem is required.

It should not be necessary for police officers to interview relatives.

Clear arrangements should be made with the relevant undertaker or the family representative for collection of the death certificate.

Any specific religious, faith or cultural requirements should be highlighted.

Copies of parts 1, 2, and the returned part 3 should be retained in the deceased patient’s record.

Deaths which are notified to the Procurator Fiscal, (including people with or suspected of having Mesothelioma), will not be reviewed by the Medical Reviewer system under the Certification of Death (Scotland) Act 2011.



meso-pro-forma1.pdf

Summary

Scotland has one of the highest incidences of asbestos related disease in the world. This unfortunate reality will see many hundreds of Scots men and women continue to die in the

coming decades from asbestos related diseases such as mesothelioma and lung cancer. Inevitably this will ensure many more bereaved families having to face the same challenges that we see today.

As we have discussed, the issue of fault is uppermost in the minds of many sufferers and their families, particularly those who suffer from a terminal disease.

Financial recompense is a secondary issue to the belief that compensation should involve recognition of the negligence and harm that has been done.

At CAA, we maintain contact with sufferers and their families throughout the claims process and in some cases long after the claims process has come to an end. We are uniquely placed to understand the challenges and difficulties that many face.

CAA liaises daily with sufferers, families and agencies including statutory bodies, advice giving organisations and legal and medical professionals. We do so in order to provide a service that helps those affected.

The current system is not perfect. There are still too many inconsistencies. CAA believes that if we all continue to work together those difficulties can be resolved. We can all contribute to making a difference to the lives of those who are afflicted by the asbestos legacy.

Useful contacts

Clydeside Action on Asbestos

<http://www.clydesideactiononasbestos.org.uk/>

Telephone: 0141 552 8852 or FREEPHONE
0800 089 1717

Thompsons Solicitors – Scotland

<http://www.thompsons-scotland.co.uk/>

Telephone 0141 221 8840 or FREEPHONE
0800 0891 331

Scottish government

‘What to do after a death in Scotland’

(11th Edition, 2013 .pdf)

<http://www.gov.scot/Publications/2013/03/9207/0>

NHS Inform

Bereavement support

<http://www.nhsinform.co.uk/bereavement/>



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